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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS R. HARRIS,

Defendant and Appellant.

H033259

(Santa Clara County

Super. Ct. No. CC467010)

Defendant Carlos R. Harris was convicted by jury trial of attempted murder (Pen. Code, §§ 187, 664), assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and first degree robbery in concert (Pen. Code, § 213, subd. (a)(1)(A)), and the jury found true an allegation that he had been armed with a firearm in the commission of these offenses (Pen. Code, § 12022, subd. (a)(1)). Defendant admitted allegations that he had suffered a prior serious felony strike conviction (Pen. Code, §§ 667, subds. (a), (b)-(i), 1170.12). At the original sentencing hearing, the trial court imposed a state prison sentence of 28 years and four months, which included a doubled upper term for the attempted murder count. In his first appeal, defendant contended, among other things, that the trial court had erred in imposing the upper term for the attempted murder count in the absence of jury findings on the aggravating circumstances. This court held that the trial court's error required a remand for resentencing in accordance with *People v.*

Sandoval (2007) 41 Cal.4th 825 (*Sandoval*). We reversed the judgment and remanded solely for resentencing.

Upon remand, defendant filed a Code of Civil Procedure section 170.6 peremptory challenge to the trial judge. His challenge was stricken. He also filed a *Romero*¹ motion and a motion for a new trial. His *Romero* motion was denied, and the court found that it lacked jurisdiction to consider his new trial motion. The trial court resentenced defendant to precisely the same state prison term as it had originally imposed. Defendant again appeals. He contends: (1) his peremptory challenge was improperly stricken; (2) the trial court misunderstood the scope of its discretion in resentencing; (3) the trial court misunderstood the scope of its discretion and abused its discretion in failing to strike the strike prior; and (4) the trial court erred in denying his new trial motion. We reject his contentions and affirm the judgment.

I. Facts

Defendant was the instigator of a plan to lure Robert Carr to San Jose and rob him of his vehicle and money. Defendant and his six compatriots, who were armed with both a gun and a knife, confronted an unsuspecting Carr in a laundry room at a San Jose apartment complex. When one of defendant's compatriots pointed the gun at Carr, Carr knocked the gun away. Defendant and his compatriots then ripped off Carr's clothing as he attempted to escape. Carr escaped from the laundry room and screamed for help. At defendant's insistence, one of defendant's compatriots stabbed Carr repeatedly, and then defendant and his compatriots ran away. Carr escaped death only because a citizen found him and called 911. He had lost nearly half the blood in his body and would have died without extraordinary medical intervention. Defendant testified at trial that he had no

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

involvement in any of the offenses. Three of his compatriots testified at trial about his involvement in the offenses.

II. Discussion

A *Sandoval* remand for resentencing has a very limited purpose. In *Sandoval*, the California Supreme Court decided “that sentencing proceedings to be held in cases that are remanded because the sentence imposed was determined to be erroneous under *Cunningham* [v. *California* (2007)] 549 U.S. 270, 127 S.Ct. 856, are to be conducted in a manner consistent with the amendments to the DSL [Determinate Sentencing Law] adopted by the Legislature.” (*Sandoval*, *supra*, 41 Cal.4th at p. 846.) “The trial court will be required [upon remand] to specify reasons for its sentencing decision, but will not be required to cite ‘facts’ that support its decision or to weigh aggravating and mitigating circumstances.” (*Sandoval*, at pp. 846-847.) “Under the amended scheme, a statement of reasons is required even if the middle term is imposed.” (*Sandoval*, at p. 847.)

“Eliminating the explicit requirement that the middle term be imposed in the absence of any aggravating or mitigating circumstances may afford the trial court somewhat greater discretion to select the upper or lower term than it had under the former scheme, but we do not believe such discretion in any way would undermine the legislative goals of establishing proportionate sentences and reducing disparity.” (*Sandoval*, *supra*, 41 Cal.4th at p. 850.) “[I]t is both accurate and realistic to recognize that, in practical terms, the difference between the pre-*Cunningham* provision of the DSL enacted by the Legislature and a statutory scheme in which the trial court has broad discretion to select among the three available terms is not substantial. It seems likely that in all but the rarest of cases the level of discretion afforded the trial court [upon remand] would lead to the same sentence as that which would have been imposed under the DSL as initially enacted.” (*Ibid.*)

A. Peremptory Challenge

1. Background

After defendant's first appeal, this court issued its remittitur on November 30, 2007. On December 26, 2007, defendant filed a peremptory challenge under Code of Civil Procedure section 170.6 to the trial judge in which his attorney declared that the judge was "prejudiced against" defendant. No factual basis for this belief was identified. The prosecution urged the court to reject the challenge on the ground that a peremptory challenge was not valid as the matter had not been remanded for a "new trial." The superior court struck the challenge on that ground.

2. Analysis

"A motion under [the peremptory challenge provisions of Code of Civil Procedure section 170.6] may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, *if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter.*"² (Code Civ. Proc., § 170.6, subd. (a)(2), italics added.)

Defendant claims that a peremptory challenge may be made after judgment is reversed and remanded for resentencing under *Sandoval*. He relies on *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245 (*Peracchi*). The issue in *Peracchi* was whether a Code of Civil Procedure section 170.6 peremptory challenge could be made after a reversal that resulted only in a remand for resentencing. "The specific question we must answer is whether a sentencing hearing that is conducted on remand after a partial

² "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding." (Code Civ. Proc., § 170.3, subd. (d).) Defendant did challenge the court's striking of the peremptory challenge by writ petition, and his petition was denied. The Attorney General does not argue that defendant is precluded from raising this issue on appeal, and, in light of our conclusion, we need not consider that issue.

reversal on appeal constitutes in itself a ‘new trial’ within the meaning of section 170.6, subdivision [(a)](2).” (*Peracchi*, at p. 1253.) The California Supreme Court “conclude[d] that resentencing is *not* a ‘new trial’ within the meaning of the Penal Code or Code of Civil Procedure section 170.6.” (*Peracchi*, at p. 1258, italics added.) “The court’s function at sentencing, however, ensures that resentencing cannot occur ‘as if no trial had been had.’ [Citation.] Far from being a proceeding at which the trier of fact resolves the issues raised in the case, the sentencing hearing—or resentencing hearing—follows the entry of the verdict and the discharge of the jury, and constitutes the occasion on which the court pronounces the judgment *arising from the verdict*.” (*Peracchi*, at p. 1254, fn. omitted.) “[A] remand for resentencing—a limited order that does not disturb the verdict or even necessarily disturb the judgment and the sentence previously pronounced—is merely one among several alternatives to the granting of a new trial, and does not itself constitute the granting of a new trial.” (*Peracchi*, at pp. 1255-1256.)

Defendant disregards the clear holding of *Peracchi* and relies instead on dicta in two footnotes to the opinion. Footnote 2 states: “Our opinion is not intended to suggest that a challenge will not lie after a remand that implicates a defendant’s rights pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], where the United States Supreme Court held: ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury, and proved beyond a reasonable doubt.’” (*Peracchi*, *supra*, 30 Cal.4th at p. 1249, fn. 2.) Footnote 8 states: “As noted, our opinion does not suggest a peremptory challenge would not lie after a remand that implicates a defendant’s rights pursuant to *Apprendi v. New Jersey*, *supra*, 530 U.S. 466.” (*Peracchi*, at p. 1260, fn. 8.)

Defendant completely misinterprets these footnotes. Neither of these footnotes suggested that a peremptory challenge would lie after a remand solely for resentencing under *Sandoval*. Instead, these footnotes were intended to acknowledge that a peremptory challenge might lie after a reversal and remand *for a jury trial* on a fact that

increased the defendant's sentence but had not been originally submitted to the jury. As *Peracchi* long preceded both *Cunningham* and *Sandoval*, the California Supreme Court clearly did not contemplate the inclusion of a *Sandoval* resentencing remand in its reference to *Apprendi* remands. *Peracchi*'s holding remains valid, and it clearly applies here. A Code of Civil Procedure section 170.6 peremptory challenge will not lie after a remand solely for resentencing. The superior court did not err in striking defendant's peremptory challenge.

B. Resentencing

Defendant contends that the trial court misunderstood the scope of its discretion with regard to resentencing.

1. Background

At a February 15, 2008 hearing, the trial court tried to explain to defendant's attorney why it was reluctant to grant his request that the resentencing hearing be delayed until June 2008. "You need to basically jump on things now though. Because as far as what we're doing -- as far as I'm concerned after hearing the trial and going continually over and over and over the re-sentencing aspect until we got to sentencing, I think what we're doing is we're just calculating a few numbers. As far as I'm concerned we're just re-calculating a few numbers based on what the appellate court said. And now that we're going to be sentencing under the new scheme I don't see that as being very significant. [¶] I don't plan on listening to a whole lot of new information about Mr. Harris because the information that I had at the time of sentencing and the fact that I listened to the jury trial, and I was involved in it, I think the sentence that was imposed was based on all that information, and I'm not going to listen to a whole lot of new information. [¶] So, like I said, do what you need to do between now and March 14th, but . . . my plan is to proceed in April with whatever information you do have for me."

Notwithstanding this statement, the court set a status hearing for March 14, and it agreed to sign an order allowing a defense psychologist to meet with defendant in jail. In March 2008, the trial court signed an order permitting a jail visit by a defense psychologist so that the psychologist could interview defendant and perform testing on him. The resentencing hearing was ultimately scheduled for June 20, 2008.

The defense psychologist produced a psychological evaluation that defendant submitted to the court in June 2008 in support of his sentencing memorandum. The psychologist found that defendant had “borderline verbal and conceptual abilities,” and that the discrepancy between defendant’s “Verbal IQ” and his “Performance IQ” was “associated with a history of acting out and behavior problems.” Defendant’s personality profile suggested that “he would be easily upset by interpersonal turmoil.” He had “significant difficulties in relating to others.” Defendant was “prone to feel anxious and react to his sense of inadequacy with rebelliousness and impulsivity.”

At the resentencing hearing, defendant’s attorney acknowledged that the court could make the same findings it had made previously, but he asked the court to “exercise its discretion and give a lesser sentence.” Defendant’s attorney asserted that defendant “may not be a danger to the community” when he is older. Defendant personally addressed the court and sought “mercy” while continuing to deny culpability.

The trial court rejected defendant’s request for leniency. “[T]he first time I sentenced Mr. Harris I thought I got it right. . . . [¶] Since then I have seen absolutely nothing that would indicate that I got it wrong. The only thing that has come up new is [the psychologist’s] report and Mr. Harris’ statement.” The court explained why it found neither the psychological evaluation nor defendant’s statement sufficient to support leniency. Defendant’s continued denial of responsibility “is just another indication to me that the first time around I got it right and I see no reason to change anything about the sentence that I imposed, and I don’t intend to.”

The court then imposed sentence. “I will exercise my discretion and impose the upper term of the three permissible terms on Count number one that would be eighteen years. As a guide I have considered both aggravating and mitigating factors in concurrence with California Rules of Court 4.421 and 4.423. I find that all the aggravating factors strongly predominate and outweigh any factors to be found. [¶] The reason[s] for the aggravated term are the following: the crimes involved great violence, great bodily harm, disclosed a high degree of cruelty and viscousness [*sic*]; [¶] The defendant in this case induced others to participate in the crimes and acted in a position of leadership; [¶] And in the manner in which the crime was carried out it involved planning and sophistication. [¶] Additionally, the court will cite the following decisions for following in favor of selecting the upper of the three permissible terms; [¶] Mr. Harris has both a lengthy and a serious juvenile and criminal history involving crimes of violence; [¶] And the use of dangerous and deadly weapons; [¶] The crimes appear to be increasing in seriousness; [¶] And at the time the offense in this case was committed the defendant was on a formal grant of probation for a crime of violence and was non-compliant with the terms and conditions of the probation grant.” The court also mentioned other “aggravating factors.” “In the court’s opinion the defendant lied under oath to the jury, and the defendant repeatedly tried to manipulate witnesses and fabricate evidence.” The court ultimately imposed precisely the same sentence that it had imposed originally: 28 years and four months in prison.

2. Analysis

Defendant claims that the trial court “failed to take into consideration” the broader discretion available to it on a *Sandoval* remand, and “it is apparent that the Superior Court failed to evaluate the new facts information provided to it by Appellant’s counsel (such as an in-depth psychological evaluation of Appellant) and concomitantly failed to apply such new facts and information at the re-sentencing.”

While a *Sandoval* remand for resentencing allows the trial court to exercise “broad discretion to select among the three available terms,” the change in the level of discretion granted to the trial court “is not substantial” and “in all but the rarest of cases” the remand will produce “the same sentence” as was originally imposed. (*Sandoval, supra*, 41 Cal.4th at p. 850.) The sole distinction is that the trial court *may* impose a mitigated, middle, or aggravated term regardless of whether it finds any mitigating or aggravating circumstances. (*Sandoval*, at p. 849.)

Clearly this change in the level of discretion afforded the trial court was inconsequential in this case. The trial court was overwhelmingly convinced that defendant was deserving of the aggravated term, and it gave a lengthy and very persuasive statement of its reasons for imposing such a term. The court obviously understood that it had discretion to impose a mitigated or middle term, and, just as obviously, it was convinced that an aggravated term was justified and necessary.

We reject defendant’s suggestion that the trial court’s statements at the February 2008 hearing indicate that it did not consider the new information presented at the June 2008 resentencing hearing. At the time of the February 2008 hearing, no new information was before the court regarding resentencing, and the court was merely expressing its belief that a lengthy continuance was unnecessary. The court ultimately granted precisely such a lengthy continuance to allow defendant’s attorney to present additional information to the court. At the June 2008 resentencing hearing, the court expressly stated that it had considered the new information presented by defendant’s attorney, including the psychological evaluation.³

³ It is difficult to understand why defendant believes that the psychological evaluation was helpful to his case, since it portrayed him as prone to act out impulsively.

There is simply no basis in the record for defendant's claim that the trial court misunderstood the scope of its discretion regarding resentencing.⁴

C. *Romero* Motion

Defendant contends that the trial court misunderstood the scope of its discretion in regard to his *Romero* motion and abused its discretion in refusing to strike the strike prior.

1. Background

Defendant filed his *Romero* motion just a few days before the June 2008 resentencing hearing. His primary contention was that the court was *required* to strike the strike prior because another court had exercised its discretion to strike the same strike prior a few years prior to defendant's current offenses after defendant suffered a possession of cocaine conviction. Defendant also argued that the psychological evaluation he submitted with his motion provided a basis for striking the strike prior.

Defendant's strike prior arose from a November 1991 incident that occurred when defendant was 20 years old. Defendant fired a .22 caliber rifle at the second-story window of a home in which he knew people were present. He missed, but the residents fled the house. Defendant and his compatriot then broke into the home, and defendant smashed two glass coffee tables inside the house. Defendant denied that he had intentionally fired the rifle at the house. He was originally charged with shooting at an occupied building (Pen. Code, § 246), but he entered a negotiated plea of guilty to discharging a firearm in a grossly negligent manner (Pen. Code, § 246.3) in exchange for dismissal of the more serious charge. A violation of Penal Code section 246.3 is a serious felony (Pen. Code, § 1192.7, subd. (c)(7)), which qualifies it as a strike.

⁴ In his previous appeal, we found that substantial evidence supported the aggravating circumstances cited by the trial court, and defendant does not argue otherwise in this appeal.

At the time he committed the 1991 offense, defendant was on parole from the California Youth Authority (CYA). He had been committed to the CYA after juvenile adjudications for burglary and assault. Before he was committed to the CYA, defendant had been committed to the Ranch, from which he had twice escaped. Although he was just 20 years old at the time of the strike prior, defendant had already accumulated adult misdemeanor convictions for petty theft and furnishing false identification to a peace officer. Nevertheless, his punishment for the strike prior was lenient; he was granted probation conditioned on a year in jail, with execution of a two-year prison term suspended. Defendant did not do well on probation. He violated his probation. He was sent back to jail for six months, and his term of probation was extended to September 1995.

Defendant ultimately completed his probation for the strike prior, but he continued his criminal career. In October 1998, defendant was found in possession of cocaine. He was charged by information with possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), and his 1991 prior conviction was alleged as a strike prior. Defendant pleaded guilty to the possession count. In September 2000, the court granted his *Romero* motion in the possession case and struck the strike prior. Defendant was granted probation conditioned on a year in jail.

Defendant's felony possession conviction was not his only significant crime between the commission of his strike prior and the current offenses. Defendant also suffered convictions in 1999 for misdemeanor spousal battery and false imprisonment. He was placed on probation and violated his probation. When he committed the current offenses in September 2004, defendant remained on probation for the 1999 offenses. In all, defendant had suffered a total of at least 12 misdemeanor convictions and two felony convictions before he committed the current offenses.

At the resentencing hearing, the trial court entertained defendant's *Romero* motion, which the trial court characterized as "appropriate" and noted "probably should

have been done the first time around.” The court explained that it had reviewed the pleadings, all of the attachments, including the psychological evaluation, and the probation report. The court described what it was required to consider in deciding whether to exercise its discretion to strike the strike prior. “[C]ase law requires the court to consider a couple of things in making that decision, that would be, take a look at the facts and circumstances of that prior conviction; taking a look at the facts and circumstances and the considerations of the present offense; and also considering Mr. Harris’ future prospects based on the decision.”

The court explained why it was unwilling to strike the strike prior. The age of the strike was “something that I would consider significant if in the interim Mr. Harris’ behavior was such that he wasn’t involved with the criminal justice system and he has been over and over and over again.” The court noted that the strike prior and the current offenses were similar in that both had involved multiple perpetrators and the use of a firearm. The present offenses were “as serious as it possibly can get,” and defendant’s level of culpability was especially high as he was the ringleader. Defendant’s “future prospects are dismal,” particularly because he had repeatedly refused to acknowledge his involvement in the current offenses. Indeed, the court viewed defendant’s trial testimony, in which he denied any involvement in the current offenses, as “perjury.” Defendant had also “tried to fabricate evidence in an attempt to defraud the court.” The court concluded that defendant “comes within the spirit of the Three Strikes law, it’s exactly what the Three Strikes law seeks to deal with, and I think it would be totally inappropriate to strike the prior conviction.”

2. Analysis

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and

circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Defendant claims that, “[f]ollowing the precedent of *Sandoval*, superior courts . . . have additional discretion in ruling upon *Romero* motions,” and the trial court “misunderstood this additional discretion when he considered and denied Appellant’s *Romero* motion.” He provides no further explanation or citation to authority for this proposition. As *Sandoval* had nothing whatsoever to do with *Romero* motions and did not provide trial courts with “additional discretion” in ruling on such motions, the premise for defendant’s contention is nonexistent.⁵

Defendant also contends that the trial court abused its discretion in denying his *Romero* motion. “[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) “In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.”’ [Citations.] Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting

⁵ Defendant suggests that the court’s statements at the February 2008 hearing suggest that it was predisposed to deny his *Romero* motion. However, defendant had not even filed a *Romero* motion at that time, and the court’s comments were directed at the timing of the resentencing hearing, not the substance of any future decisions.

its judgment for the judgment of the trial judge.’”’ [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony*, at pp. 376-377.)

Defendant argues that, “[g]iven the age and nature of the prior [strike] offense, and the information provided in [the psychological evaluation], the Superior court abused its discretion” in refusing to strike the strike prior. His contention is at odds with the deferential standard of review that we are bound to apply to the trial court’s decision.

The trial court clearly articulated and applied precisely the standard that *Williams* requires it to apply in ruling on a *Romero* motion. The court considered the facts and circumstances of the current offenses and of the strike prior. It examined defendant’s background, character, and prospects. The trial court found that every single one of these factors weighed against striking the strike prior, and that decision is well supported by the record.

The current offenses were extremely aggravated, and the strike prior demonstrated that defendant had long posed a danger to the community. In the current offenses, defendant was the instigator of a group assault on an unsuspecting and unarmed man. Although their initial motivation was robbery, their failure to obtain anything of value from their victim did not deter them from continuing to assault him. When the victim attempted to escape, defendant urged his compatriot to stab him. The victim came very close to death. Defendant fled and denied any involvement. In the 1991 strike prior, knowing that people were home, defendant aimed a rifle at an upstairs window of a house and fired. He missed, but he was undeterred. Defendant and his compatriot forced their way into the home and destroyed items inside. Defendant’s involvement with compatriots and firearms on both occasions is indicative of his continued commitment to violence.

Defendant's background, character, and prospects are those of a career criminal. He was committed to the Ranch as a juvenile and repeatedly escaped. After serving a CYA commitment, and while still on parole, he committed the strike prior. He violated his probation for the strike prior. Defendant suffered a host of additional criminal convictions, including domestic violence, over the years between the strike prior and the current offenses. He was on probation for domestic violence when he committed the current offenses. With this background, it is clear that his character is malignant and his prospects are, as the trial court termed them, "dismal." He is a violent man who has not been deterred by repeated periods of incarceration. Indeed, when his strike prior was stricken previously, he did nothing but increase his level of criminality.

There was nothing in the psychological evaluation that could possibly counter the evidence that defendant is a violent, unrepentant, career criminal who poses a substantial danger to the community. Instead, the psychological evaluation was consistent with the trial court's conclusion that defendant comes within the spirit of the Three Strikes law. Defendant has failed to demonstrate that the trial court's refusal to strike the strike prior was irrational or arbitrary.

D. New Trial Motion

Defendant contends that the trial court erred in denying his post-remand motion for a new trial.

On June 18, 2008, two days before the resentencing hearing, defendant filed a motion for a new trial based on juror misconduct. The juror misconduct allegation was based on a comment defendant apparently made during a *Marsden*⁶ hearing prior to the entry of the original judgment about recognizing one of the jurors as a former teacher of his. The prosecution contended that the trial court lacked jurisdiction to entertain

⁶ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

defendant's new trial motion. The trial court found that it lacked jurisdiction to hear a new trial motion because the case had been remanded solely for resentencing.

Defendant's new trial motion was denied.

A new trial motion is not available after an appellate reversal of the original judgment that remands the matter solely for resentencing. "Where an appellate court limits its reversal solely for the purpose of rearraigning defendant for judgment and sentence, on a subsequent appeal following the rearraignment for judgment hearing, only errors connected with that hearing may be considered." (*People v. Smyers* (1969) 2 Cal.App.3d 666, 668.) "[T]he defendant had a right to move for a new trial before the pronouncement of the original judgment, he waived it, and then exercised his remedy of appeal against that judgment and the conviction upon which it was, and upon which the present judgment now is, predicated. The [implied] affirmance of the issue of guilt on the first appeal precludes subsequent review by the trial court on a motion for new trial." (*People v. Pineda* (1967) 253 Cal.App.2d 443, 453; *People v. Oppenheimer* (1965) 236 Cal.App.2d 863, 866 [trial court lacked jurisdiction to entertain new trial motion after appellate court remanded for vacation of order granting probation and correction of sentencing errors].)

Defendant makes no attempt to argue that these cases are wrong or inapplicable here. Since the trial court was not authorized to entertain a new trial motion after a remand solely for resentencing, the denial of defendant's new trial motion was not erroneous.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

McAdams, J.